United States Bankruptcy Court
Northern District of Texas
1100 Commerce Street, Suite 12A24
Dallas, Texas 75242

Chambers of
Barbara J. Houser
United States Bankruptcy Judge

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November 5, 2001

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Re: *In re Cheeks*, Case No. 401-41739-13-BJH

Dear Counsel:

Before the Court is the Trustee's Objection to Debtor's Claim of Exemptions (the "Objection") filed on May 30, 2001. Jacquelyne Louise Cheeks (the "Debtor") filed a response to the Objection on July 9, 2001 (the "Response") and a brief in support of that response on July 17, 2001. At the conclusion of the September 6, 2001 hearing, the Court took the Objection under advisement. This letter states the Court's findings of fact and conclusions of law on the Objection.

After careful consideration of the Objection, the Response, the testimony at the hearing, and the arguments of counsel, the Court concludes that the Objection should be overruled. The Court's analysis is set forth below.

I. Introduction

The Debtor has claimed certain real property located at 4025 Johnson Street, Fort Smith, Arkansas (the "Arkansas Property") as exempt. Under 11 U.S.C. § 522 (d)(1), the Debtor may exempt real or personal property used as a "residence" by the Debtor or a dependent of the Debtor up to a value of $16,150.00. The Trustee contends that because the Debtor (or her dependent) did not reside on the Arkansas Property when the Debtor's case was filed, she cannot claim the Arkansas Property as exempt. The Debtor contends that while she (or a dependent) did not physically reside on the Arkansas Property when she filed her case, physical residence is not a requirement for exempting real property under 11 U.S.C. § 522(d)(1). Rather, the Debtor contends that: (i) "residence" as used in § 522(d)(1) includes a debtor's homestead, (ii) the

Arkansas Property is her homestead, and (iii) she has not abandoned her Arkansas homestead by living in Texas for the last several years.

II. Factual Background

At the hearing, the Debtor testified that she and her husband owned a home in the state of Arkansas, *i.e.*, the Arkansas Property. The Debtor further testified that in 1990, she moved to Texas because the employment opportunities were better here than in Arkansas. Since she moved to Texas in 1990, the Debtor has rented a place to live; she has not purchased any real property here. She currently lives in a home she rents at 2724 Countryside Lane, Fort Worth, Texas. The Debtor testified that from 1990 until her husband's death in 1998, he lived on the Arkansas Property with other members of their immediate family and she commuted back and forth from Arkansas to Texas. Since her husband's death, the rest of her immediate family has moved to Texas and she no longer commutes back and forth. In fact, the Debtor testified that the Arkansas Property has remained vacant since her husband's death. Although the Debtor testified that she has considered selling the Arkansas Property from time to time, she has never listed it for sale or rented it out. Finally, regarding her intention to return to Arkansas and occupy the Arkansas Property, the Debtor testified as follows: "[w]ell, right now I can not give a definite date of times [sic] when I would like to return [to Arkansas]. We have family there. We would like to have a place to go. You know, if something happens there [sic]. Go and stay. We would like to have a place we can call home. That we can return to if necessary."

Clarifying her earlier testimony regarding whether she had ever thought about selling the Arkansas Property, she testified that the property had not been listed for sale because "[a]fter discussion with the children and, you know, they wanted me to have some place to go." When asked what was preventing her from returning to Arkansas and living on the Arkansas Property now, the Debtor testified that "[r]ight now I'm 60 years old. I am employed. I could not leave the employment that I have here and go to Arkansas and find employment equal to what I'm doing here." When asked if she intended to return to Arkansas and live on the Arkansas Property when she reaches retirement age, the Debtor testified that "I think I would like to do that – yes."

III. Discussion

The parties agree that the Debtor is claiming federal exemptions in her bankruptcy case and that the Trustee bears the initial burden of proof, *i.e.*, that the Trustee must establish that at the time of her bankruptcy filing, the debtor was not entitled to the claimed exemption. *See In re Lusiak*, 247 B.R. 699, 702 (Bankr. N.D. Ohio 2000) (citing *In re Sims*, 241 B.R. 467, 468 (Bankr. N.D. Okla. 1999); *see also In re Brent*, 68 B.R. 893, 894 (Bankr. D. Vt. 1987); Fed. R. Bankr. P. 4003(c). The parties also agree that the first question the Court must decide is whether the term "residence" as used in § 522(d)(1) of the Bankruptcy Code is synonymous with the term "homestead." As noted previously, § 522(d)(1) allows a debtor to exempt the "debtor's

aggregate interest, not to exceed $16,150.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence . . . ." 11 U.S.C. § 522(d)(1).

Unfortunately, the Bankruptcy Code does not define the term "residence." The Trustee contends that the Court should look to the root word of residence and determine that Congress intended "residence" to mean the place where the Debtor (or a dependent of the Debtor) actually resides or lives. Thus, according to the Trustee, since the Debtor lived here in Texas at the time she filed her Chapter 13 case on March 9, 2001, the Arkansas Property was not her "residence."

However, the Debtor points to a more flexible definition of "residence" under federal law that several courts have adopted. *See, e.g. In re DeMasi*, 227 B.R. 586, 588 (D. R.I. 1998); *In re Tomko*, 87 B.R. 372, 374 (Bankr. E.D. Penn. 1988); *In re Brent*, 68 B.R. 893, 895 (Bankr. D. Vt. 1987). While recognizing that "residence" generally refers to a home that a debtor owns and occupies at the time of a bankruptcy filing, these courts have concluded that "the determining factor should not be so mechanical as to require a debtor to occupy the home on the filing date or use the address on the bankruptcy filing." *In re DeMasi*, 227 B.R. at 588; *see also In re Anderson*, 240 B.R. 254, 258 (Bankr. W.D. Tex. 1999). These courts have looked to the goal of the exemption (*i.e.*, the intent to protect the debtor's home) and the "totality of circumstances" to determine if the property qualifies as the debtor's residence. *In re DeMasi*, 227 B.R. at 588.

The legislative history of § 522(d)(1) is also helpful in determining Congressional intent. *See In re Tomko*, 87 B.R. at 373. Section 522(d)(1) was derived from H.R. 8200, 95th Cong. 1st Sess. (1977). The House Report that accompanied H.R. 2000 explained § 522(d)(1) as follows:

> Subsection (d) specifies the Federal exemptions to which the debtor is entitled. . . . Eleven categories of property are exempted. First is a homestead . . . which may be claimed in real or personal property that the debtor or a dependent of the debtor uses as a residence.

H.R. 8200, 95th Cong. 1st Sess. (1977), U.S. Code Cong. & Admin. News 1978, p. 5787; House Report No. 95-595.

Based on this legislative history, several courts have found that the purpose of § 522(d)(1) is "to provide those debtors eligible to select the federal exemptions with a homestead exemption, and that residence must be interpreted in this light." *In re Tomko*, 87 B.R. at 374; *see also In re Anderson*, 240 B.R. at 256 (thus, the term "residence" as used in the section is equivalent to "homestead."); *In re Brent*, 68 B.R. at 895 ("We assume that Congress intended the words homestead and residence to be interchangeable.").

Given the reference in the legislative history to a "federal homestead exemption," and the absence of any other definition of "residence" in the Bankruptcy Code, this Court agrees that it is appropriate to equate "residence" and "homestead" when applying § 522(d)(1). *See In re*

Anderson, 240 B.R. at 256; *see also In re Buick*, 237 B.R. 607, 610 (W.D. Penn. 1999). Because the Court concludes that the term "residence" in § 522(d)(1) is synonymous with a debtor's homestead, the Court must next decide if the Arkansas Property is the Debtor's homestead.

The parties disagree over whether the Court should look at federal law or state law, and further disagree over whether the relevant state law is Texas or Arkansas. As the *Anderson* court noted:

> A homestead is a property interest. Ordinarily, "property interests and estates are to be dealt with in the bankruptcy courts in such manner as to give full respect to the rules of property followed in the state where the property is located." The Supreme Court in *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), discussed the general rule:
>
> Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. . . . Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.
>
> *Id.* at 54, 55, 99 S.Ct. 914 (footnotes omitted).
>
> Whether § 522(d)(1) manifests such an overriding federal interest is, however, not clear. On the one hand, it was enacted for the purpose of providing a uniform, minimum exemption available to (originally, at least) all states' citizens as an express alternative to the various state law homestead exemptions (or lack of homestead exemption). On the other hand, Congress has permitted each state to "opt out" and prohibit its citizens altogether from using § 522(d)(1) and the other federal bankruptcy exemptions. *See* 11 U.S.C. § 522(b)(1).
>
> What is clearer is that bankruptcy courts that have interpreted § 522(d)(1), whether because of lack of precedent under that section or deference to state law on issues involving property rights, have turned to relevant state law in order to fill in the gaps regarding a debtor's exemption of a homestead" under § 522(d)(1).

Id. at 257 (case citations omitted). As the *Anderson* court further noted:

> . . . there are certain rules that appear to be common to most states' homestead laws:
>
> (a) a property does not constitute a homestead unless it is occupied, either actually or constructively, . . .

> (b) "[o]nce a property has become a homestead, [however,] it can lose its character [as such] only through death, alienation, or abandonment," . . .
> (c) "[a]bsence from the homestead that is involuntary or compulsory does not constitute a relinquishment of homestead rights; in order to constitute an abandonment of a homestead, the absence must be voluntary and not under compulsion," . . . and
> (d) an involuntary or compelled absence from the homestead thus constitutes either an exception to the homestead occupancy requirement, . . . or a constructive form of occupying a homestead.

Id. at 258 (case citations omitted).

It appears that Arkansas state law is similar. Under Arkansas law, homestead laws "are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended." *Tri-State Delta Chems., Inc. v. Wilkison*, 2001 WL 1132046, __ S.W. 3d __ (Ark. Ct. App. 2001). Under Arkansas law, any resident of the state who is married or the head of a family can acquire a homestead. Ark. Const. art. 9, § 3. Once acquired, an individual does not lose the homestead exemption because of divorce or the death of a spouse. *Tri-State Delta Chems., Inc,* 2001 WL 1132046. Once acquired, the homestead exemption can only be lost by waiver or abandonment. *Id.*

A homestead may be found to be abandoned when the debtor sells the property or establishes a new homestead. *See In re Brent*, 68 B.R. at 896. Absence from the property alone is not sufficient to constitute an abandonment unless an intent to abandon is shown. *Id.* at 895. Absence from the homestead that is involuntary or compulsory does not constitute a relinquishment of homestead rights; in order to constitute an abandonment of a homestead, the absence must be voluntary and not under compulsion. *Id.* at 896. If the debtor intends to return to the homestead, then the homestead has not been abandoned, and remains exempt during the intervening absence. *Id.* The deciding consideration in determining whether the debtor's absence represents abandonment is whether the debtor has an intent to return. *See id*; *see also Smith v. Flash TV Sales and Serv., Inc.*, 706 S.W.2d 184, 187-88 (Ark. Ct. App. 1986) (quoting *Caldcleugh v. Caldcleugh*, 250 S.W. 324, 326 (Ark. 1923)("[a]n abandonment of a homestead is almost, if not entirely, a question of intent, which must be determined from the facts and circumstances attending each case"). A debtor's intent to maintain or abandon the homestead must be determined in relation to the surrounding exigencies. *In re Brent*, 68 B.R. at 896. In other words, for a debtor to establish a requisite intent to return to the homestead property, the debtor's own testimony must be coupled with external circumstances which demonstrate that it is realistic to expect that the debtor may actually return to the property. *See In re Lusiak*, 247 B.R. at 703.

A debtor's involuntary or compelled absence from his property, in conjunction with credible testimony of his intent to return, while not conclusive, has been found to be very

probative of a debtor's actual intent to return to his property. *See In re Lusiak,* 247 B.R. at 703. Courts have found that debtors who no longer occupy their homestead due to military service (*In re Anderson*, 240 B.R. 254), due to a court order demanding his removal (*In re Tomko*, 87 B.R. 372), or even due to an erroneous belief that a court order prevented their occupation (*In re Brent*, 68 B.R. 893), did not lose their homestead because those absences were considered compulsory or involuntary. In addition, one court has held that where a life tenant refused to allow her nephew, who owned a one-half remainder interest, to live in the house, the nephew did not lose his homestead exemption. *In re DeMasi*, 227 B.R. 586. More importantly for the present case, the Arkansas Supreme Court has held that "[a] removal from the homestead may be caused by necessity or for business purposes, and if the owner has an unqualified intention to preserve it as a homestead and return to it, his removal will not result in an abandonment of the land as a homestead." *Smith v. Flash TV Sales and Serv., Inc.*, 706 S.W.2d at 187-88 (quoting *Caldcleugh*, 250 S.W. at 326). Finally, the Arkansas Supreme Court has held that "the legal presumption is that the homestead continues until it is clearly shown that it has been abandoned. The burden is upon one claiming that a homestead has been abandoned to establish that fact." *Id.* at 187.

Here, the Debtor was a married resident of Arkansas when she and her husband purchased the Arkansas Property. Thus, under Arkansas law, the Arkansas Property qualified as the Debtor's homestead. According to the undisputed testimony at the hearing, the Debtor's husband and some of her children continued to reside on the Arkansas Property until her husband died in 1998, and the Debtor commuted back and forth regularly to the Arkansas Property from 1990 until his death. The parties agree that the Debtor did not lose her homestead exemption upon the death of her husband in 1998. Thus, the question is whether the Debtor's absence from the Arkansas Property since her husband's death constitutes an abandonment of her homestead. In other words, had the Debtor abandoned the Arkansas Property as her homestead as of March 9, 2001, the date of her bankruptcy filing? To answer this question, the Court must decide if the Debtor's testimony establishes the requisite intent to return to the Arkansas Property and, if so, do the external circumstances demonstrate that it is realistic to expect that she will return to the Arkansas Property. As noted previously, the Trustee bears the burden of proof to establish that the Debtor abandoned the Arkansas Property as her homestead. *See Smith v. Flash TV Sales and Serv., Inc.*, 706 S.W.2d at 187-88; *see also* In re Lusiak, 247 B.R. at 703 ("Nevertheless, as constructive occupancy is essentially an affirmative defense to a prima facie case of abandonment, it is the debtor who bears the burden to show that he was in constructive occupancy of the premises at the time of the filing of the bankruptcy petition.")

The Debtor testified that although she has considered selling the Arkansas Property from time to time, after discussion with her children, a decision was made not to sell the property because "they wanted me to have some place to go." While she has lived in Texas, the Debtor has only rented property – she has not established another homestead. Although it appears that

the Debtor voluntarily chose to seek employment in Texas in 1990,[1] in some respects she has become trapped by that initial decision. From the Debtor's testimony it appears that she has a job here in Texas that could not be replaced with a comparable position in Arkansas. Thus, unless she is prepared to accept lesser employment, she cannot return to the Arkansas Property until after she reaches retirement age. While these facts do not rise to the level of involuntary or compulsory removal indicated by military service, court order, or eviction of a family member, the Debtor's absence from the Arkansas Property following her husband's death was, in a way, involuntary. The fact that the Debtor commuted for eight years between Arkansas and Texas shows her intent to maintain the Arkansas Property as her homestead. The Debtor has also testified that she still has family in Arkansas and that she would like to retire to the Arkansas Property.

Based upon the Debtor's testified intent to return to the Arkansas Property, and the external circumstances identified herein that suggest that it is realistic to expect that the Debtor will retire to the Arkansas Property, the Court concludes that the Debtor has not abandoned the Arkansas Property as her homestead. Thus, the Objection is overruled.

A copy of the Court's Order overruling the Objection is enclosed. This letter ruling and the Order were forwarded to the Clerk's office today for filing.

Sincerely,

Barbara Houser

Barbara J. Houser
United States Bankruptcy Judge

Enclosures

[1]Although the Response and supporting brief state that the Debtor moved to Texas after she "lost her job in Arkansas, the Debtor's testimony does not support this statement. The Debtor's testimony suggests that she voluntarily elected to move to Texas because there were better job opportunities here.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
JACQUELYNE LOUISE CHEEKS,	§	**Case No. 01-41739-BJH-13**
	§	
Debtor.	§	

ORDER OVERRULING TRUSTEE'S OBJECTION
TO DEBTOR'S CLAIM OF EXEMPTIONS

Before the Court is the Trustee's Objection to Debtor's Claim of Exemptions ("the Objection") filed on May 30, 2001. For the reasons contained in the Letter Opinion entered concurrently herewith, the Court is of the opinion that the exemption is proper, that the property in question is the Debtor's homestead, and that the Debtor has not abandoned that homestead. The Objection should be and therefore is OVERRULED.

SO ORDERED.

Signed: November 5, 2001.

Barbara Houser

Barbara J. Houser
United States Bankruptcy Judge